

BAN Comments to Draft Export Fact Sheet Received January 30, 2004

Dear Peggy Harris:

Thank you for allowing the Basel Action Network to comment on the text of the fact sheet on export requirements under SB20. Enclosed is an attachment of the text extracted from the PDF that has been reviewed with Microsoft Word's Track Changes function. Below we comment on our primary concerns. Please feel free to circulate our comments as you see fit.

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It is very clear from reading the fact sheet that there is a great deal of misunderstanding about the bill's relationship to international law and its ability to prevent the very dirty recycling that BAN and the Silicon Valley Toxics Coalition documented in China and other Asian countries in our report "Exporting Harm: The High Tech Trashing of Asia".

At the outset, it is important to make it absolutely clear that the language of SB20 will immediately effectively prohibit all exports from California to countries that are Parties to the Basel Convention unless they are also member states of the Organization of Economic Cooperation and Development (OECD). This is the current reality and must be so stated at the outset. We believe this can best be done by annexing a list of countries to which import by them is barred and thus export is likewise barred. The reason for this prohibition is that SB20 dictates that "A person who intends to export covered electronic waste must demonstrate that the covered electronic waste can legally be imported into the destination country and that the covered electronic waste is imported in accordance with applicable law." "Applicable law" includes the Basel Convention as it applies to Parties to it. And Article 4, paragraph 5 of the Basel Convention reads: "A Party shall not permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party." The United States is a non-Party. There is one exception to this rule that is later stipulated in Article 11 of the Basel Convention and that is that a non-Party can trade in hazardous wastes with a Party if there is a special high level multilateral or bilateral agreement signed between the two states that is consistent with the Basel Convention. Currently the United States only has such agreements for exporting hazardous wastes from its territory with other OECD member states. In sum, all of the nuts and bolt questions and requirements are largely mooted for the moment for all exports from California outside of the OECD group of states. This is not made clear in the fact sheet.

Further, the implementational side of the fact sheet suffers badly from not understanding that the initial destination of an exporter can often be a broker or a warehouse waste distributor or merely a relatively clean dismantling operation. The dirty operations come subsequent to that in the so-called "informal sector" -- downstream of the initial facility. Without explicitly ensuring that the criteria of SB20 cover all such downstream operations until such time as the material is no longer a

waste, but rather a product (e.g. no longer in or moving to a disposal or recycling operation), then the intent of SB20 will be badly undermined.

While BAN is not at all happy with SB20 from the standpoint of export, as it seeks to legitimize exports on technological grounds for toxic waste that will, due to brute economics, disproportionately burden Asians with pollution from California, in opposition to all principles of environmental justice and in opposition to a globally adopted ban on such exports (Basel Convention Decision II/12), we nevertheless believe it is imperative that our comments and information herein, be taken on board, if the original intent and text of the bill is to be honored and adhered to.

Please feel free to contact us in regard to any of these issues. We will be happy to elaborate on these comments and suggestions.

Sincerely yours,

Jim Puckett  
Coordinator  
Basel Action Network

## [DRAFT SB20 Fact Sheet on Export]

Effective January 1, 2004, the Electronic Waste Recycling Act of 2003 [Senate Bill(SB) 20, Sher] requires anyone who intends to export covered electronic waste to notify the Department of Toxic Substances Control (DTSC) and to demonstrate that the covered electronic wastes will be properly handled and in accordance with all applicable laws and international agreements. Covered electronic wastes include discarded cathode ray tubes (CRTs), CRT devices (e.g., televisions and computer monitors), CRT glass or cullet, and other similar electronic wastes that DTSC designates as hazardous waste in the future. Presently, DTSC is testing liquid crystal display (LCD) desktop monitors and laptop computers to determine if they are hazardous wastes. This testing will be completed in the spring of 2004. Until then, the SB 20 export requirements apply to only CRTs and CRT devices.

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**Information contained in this fact sheet provides guidance for compliance with SB 20 export requirements to persons who intend to export. DTSC may adopt regulations implementing the export provisions of SB 20 as needed.**

## **II. THE EXPORT REQUIREMENTS** **[Public Resources Code (PRC) section 42476.5]**

- The following notification and demonstrations are required to be submitted to DTSC at least 60 days prior to the export of covered electronic waste:

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### **Notification**

- PRC section 42476.5 (a) requires that a person who intends to export: *“Notify the department of the destination, contents, and volume of covered electronic waste to be exported.”*

### **Demonstrations**

- PRC section 42476.5(b) requires that a person who intends to export: *“Demonstrate that the importation of covered electronic waste is not prohibited by any applicable law or regulation of the country of destination and that any import is conducted in accordance with all applicable laws. As part of this demonstration, required import and operating licenses shall be forwarded to the department.”*
- PRC section 42476.5(c) requires that a person who intends to export: *“Demonstrate that the exportation of covered electronic waste is conducted only in accordance with applicable international law.”*
- PRC section 42476.5 (d) requires that a person who intends to export: *“Demonstrate that the management of the exported covered electronic waste will be handled within the country of destination in accordance with applicable rules, standards, and requirements adopted by*

*the Organization for Economic Co-operation and Development for the environmentally sound management of electronic waste.”*

- PRC section 42476.5 (e) requires that a person who intends to export: “*Demonstrate that the covered electronic waste is being exported for the purpose of reuse or recycling.*”

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**Comment:** It is better to have the demonstrations of legality fulfilled and checked prior to the demonstrations of where the material goes and the technology.

### III. COMPLIANCE OPTIONS

The following are examples of some options for complying with the export notification and demonstrations required by SB 20. These examples do not preclude submittal of other forms of notification or demonstration that, upon review, DTSC finds to be acceptable. Please note that the notification required by PRC section 42476.5(a) and the demonstrations required by PRC sections 42476.5(b)-(e) must be submitted to DTSC at least 60 days prior to export.

A. Notification [PRC section 42476.5(a)]. This notification provides specific information on the type and volume of exported covered electronic waste, and the destination of the exported covered wastes. **It is vital that this information include all downstream recycling operations from the initial point of contact in the destination country.** The notification may cover export activities extending over a twelve (12) month or lesser period. A person who intends to export may consider the following types of notifications:

1. A person who intends to export covered electronic wastes may submit a letter of notification to the address provided at the end of this Fact Sheet, at least sixty days prior to shipment. [Note: This option does not waive other applicable export notification requirements (e.g., California Code of Regulations, title 22, section 66273.90).] The letter of notification shall include:
  - a. Name and address of the receiving facility **and all downstream recycling operations in the destination country.**
  - b. Description of the covered electronic wastes.
  - c. Quantity of the covered electronic wastes in pounds,

kilograms, number of units, etc.

d. Name and address of the Exporter of Record

e. The name/location of the point of exit from U.S.

f. The name/location of the point of entry into the destination country.

g. Generator Identification number, if applicable.

2. A person who intends to export covered electronic wastes consisting of CRT or CRT devices that meet criteria for management as universal waste, may submit a notice equivalent to the universal waste export notice required by California Code of Regulations, title 22, section 66273.90. However, such notice shall be submitted at least sixty days prior to shipment.
3. A person who intends to export covered electronic wastes that are consumer electronic devices and meet the criteria for management as universal waste, may submit a notice equivalent to the universal waste export notice required by

California Code of Regulations, title 22, section 66273.20(d), or 66273.40(d), as appropriate. However, such notice shall be submitted at least sixty days prior to shipment.

4. A person who intends to export covered electronic wastes may submit a completed copy of an U.S. EPA Acknowledgement of Consent as specified in California Code of Regulations, title 22, section 66262.53 and a

copy of the manifest as specified in California Code of Regulations, title 22, section 66262.54. However, such notice shall be submitted at least sixty days prior to shipment. B. Demonstration [PRC section 42476.5(b)]. A person who intends to export covered electronic waste must demonstrate that the covered electronic waste can legally be imported into the destination country and that the covered electronic waste is imported in accordance with applicable law. Due to the fact that Basel Convention Parties are unable to import hazardous wastes from non-Basel Parties unless a special bilateral or multilateral agreement is signed, all exports to countries that appear on Annex A to this fact sheet are prohibited.

Submission of a copy of each import license and operating license required for the importation of the covered electronic waste will satisfy this requirement. If import and operating licenses are not required, compliance options include: 1. A person who intends to export covered electronic wastes may submit a "Notice of Consent" or similar document from the authority that approved the import. 2.

C. Demonstration [PRC section 42476.5(c)]. A person who intends to export covered electronic wastes must demonstrate that the export of its covered electronic waste is in  
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compliance with applicable international law. Examples of international agreements related exports include but is not limited to: the International Carriage of Dangerous Goods by Road (ADR, 1957), the International Maritime Dangerous Goods Code (IMDG, 1985), the Convention on International Civil Aviation (Chicago Convention, 1944), the International Convention for the Prevention of Pollution from Ships (MARPOL, 1973/1978), the International Convention for the Safety of Life at Sea (SOLAS, 1974), and the Convention Concerning International Carriage by Rail (COTIF, 1985). The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, the Council Decisions of the Organization of Economic Cooperation and Development including C(86)64(final) and C(2001)107/Final. Compliance options include:

1. A person who intends to export covered electronic wastes may submit documentation of approval of export by federal agencies that enforce or implement international law, such as the United States Environmental Protection Agency, the United States Department of State, United States Customs, or the United States Department of Commerce.

2. Demonstration [PRC section 42476.5(d)]. A person who intends to export covered electronic wastes must demonstrate that the management of the exported covered electronic waste will be handled within the destination country in accordance with applicable rules, standards, and requirements adopted by the Organization for Economic

**Comment:** It is vital to have a full understanding of which countries are a) Basel Convention Parties. If they are, then it will be impossible for them to import CRTs or CRT glass cullet without a special bilateral or multilateral agreement with the United States in accordance with Article 11 of the Basel Convention. This is due to the fact that the Basel Convention does not allow trade in hazardous wastes between Parties and non-Parties and the United States is a non-Party. Article 4, paragraph 5 of the Basel Convention reads: "A Party shall not permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party." Currently the only Article 11 agreement the United States has engaged in, involves the OECD group of states and a separate one with Canada. Thus currently, all exports to non-OECD countries that are Basel Parties will not be in accordance with applicable law in the recipient country as all imports into that country can only take place with such an agreement being in place. This is such a dramatic point that it must be placed at the front of the entire document. In effect all exports to any Asian country excepting Taiwan (non-Basel), Japan (OECD) or South Korea (OECD) (which I believe has an export ban) will be [1]

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**Comment:** An individual in this country should not be the final arbiter of the domestic laws of another country except where it is obvious that the import is illegal (e.g. as I have described in the comment above about trade between parties and non-Parties.

**Deleted:** A person who intends to export covered electronic wastes may submit a certified statement signed by the person who intends to export covered electronic wastes that describes the controls that will be in place to ensure that the applicable legal requirements [2]

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**Comment:** It is highly unlikely that such persons will understand the laws. Transboundary movement of hazardous waste is serious business, as it is subject to international law which requires state approval (e.g. OECD Council Decisions requirement for notifications and [3]

**Deleted:** . A person who intends to export covered electronic wastes may submit a certified statement, signed by the person who intends to export covered electronic wastes that describes the controls that will be in place to ensure that applicable international law is met

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Co-operation and Development Requirements (OECD Requirements). Compliance options include:

1. ~~This is not possible. OECD agreements cited above, require state to state notification and consent.~~

E. Demonstration [PRC section 42476.5(e)]. A person who intends to export must demonstrate that the covered electronic waste is being exported for the purpose of reuse or recycling. ~~(Compliance)~~ options include:

1. A person who intends to export covered electronic wastes may submit a copy of a signed contract that requires recycling/reuse of the covered electronic waste by the destination facility and all downstream operations.

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A person who intends to export covered electronic wastes may submit a copy of a letter or inspection report from the authority that approves the import. The letter shall verify that recycling activities by the facility of import are in compliance with domestic laws.

3. A person who intends to export covered electronic wastes may submit copies of audits of receiving recovery facilities. Such audits should indicate how the materials are processed or reused and the final destination of any recycling/treatment residuals including audits for all downstream recycling operations.

4. A person who intends to export covered electronic wastes may submit mass balances from the destination facility and all downstream recycling operations from that facility that show 1) recycling efficiencies, and 2) proper disposal of fractions not recycled. The mass balances should be based upon previous recycling by the destination facility for similar materials.

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6.

**Deleted:** A person who intends to export covered electronic wastes may submit a certified statement signed by the person who intends to export covered electronic wastes that describes the controls that will be in place to ensure compliance with applicable OECD Requirements.

**Comment:** What is asserted here is simply not true. The OECD is able to trade wastes within its member state area for final disposal as well as for recycling.

**Deleted:** No demonstration is required for exports to OECD countries since OECD countries only allow importation of covered electronic waste for this purpose. For exports to non-OECD countries,

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**Comment:** This is not the same as determining the material will be recycled.

**Deleted:** A person who intends to export covered electronic waste may submit a copy of the operating permits issued to the destination facility by the competent authority of the destination country

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**Comment:** This is likewise not a guarantee of recycling of any kind.

**Deleted:** A person who intends to export covered electronic wastes may submit any ISO 14001 Certificates relating to the proper management of covered electronic wastes at the destination facility

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**Comment:** This is not acceptable. The public has the right to know where their computer waste may end up. All such information should not be exempt from public disclosure laws.

**Deleted:** In accordance with title 22, California Code of Regulations, section 66260.2, any information submitted to the DTSC may be claimed as confidential by the submitter. Any such claim shall be asserted at the time of submission. If

**Deleted:** no claim is made at the time of submission, DTSC may make the information

**Comment:** If trade secret rules of California in fact a lso prevent Californian's from knowing where their computer waste ends up, then this language is likewise unacceptable. In retaining this language BAN is under the assumption that trade secrets are restricted to the design of operations and products and not of choice of vendors/buyers.

#### IV. CONFIDENTIALITY REQUESTS

~~Unless information provided to DTSC is claimed to be a "trade secret" within the meaning of Health and Safety Code (HSC) section 25173, all such information will be made available to the public without further notice.~~

If any of the information provided to DTSC is believed to be a "trade secret" within the meaning of Health and Safety Code (HSC) section 25173, the trade secret item(s) must be clearly identified "Confidential: Trade Secret" in the submitted document. All unmarked items will be available for public release without notice to the facility owner and/or operator. If only parts of documents are confidential, the following must be submitted: two copies of the document, with one complete copy showing the confidential items (marked as described above) and the second copy (redacted copy) with the confidential items deleted. Eligible copies of documents submitted to DTSC that contain a trade secret item will be maintained in controlled ~~files~~.

## **V. CONTACT DTSC**

Notifications and demonstration documents should be mailed or forwarded to DTSC at the following address:

Department of Toxic Substances Control

P.O. Box 806, 11<sup>th</sup> Floor

Sacramento, California 95812-0806

Attention: Electronic Waste Export

It is vital to have a full understanding of which countries are a) Basel Convention Parties. If they are, then it will be impossible for them to import CRTs or CRT glass cullet without a special bilateral or multilateral agreement with the United States in accordance with Article 11 of the Basel Convention. This is due to the fact that the Basel Convention does not allow trade in hazardous wastes between Parties and non-Parties and the United States is a non-Party. Article 4, paragraph 5 of the Basel Convention reads: "*A Party shall not permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party.*" Currently the only Article 11 agreement the United States has engaged in, involves the OECD group of states and a separate one with Canada. Thus currently, all exports to non-OECD countries that are Basel Parties will not be in accordance with applicable law in the recipient country as all imports into that country can only take place with such an agreement being in place. This is such a dramatic point that it must be placed at the front of the entire document. In effect all exports to any Asian country excepting Taiwan (non-Basel), Japan (OECD) or South Korea (OECD) (which I believe has an export ban) will be impossible under the California language. There must then be a list attached to the document that includes all Basel Convention Parties that are not member states of the OECD and this list should clearly be labeled – export is prohibited at the current time.

A person who intends to export covered electronic wastes may submit a certified statement signed by the person who intends to export covered electronic wastes that describes the controls that will be in place to ensure that the applicable legal requirements are met

It is highly unlikely that such persons will understand the laws. Transboundary movement of hazardous waste is serious business, as it is subject to international law which requires state approval (e.g. OECD Council Decisions requirement for notifications and consent from state to state)